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No. 97-338

In the Supreme Court of the United States

OCTOBER TERM, 1997

AHMET AKTEPE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether claims by active-duty Turkish Navy sailors against the United States under the Public Vessels Act for injuries sustained on the high seas during joint NATO training exercises with the United States Navy were properly dismissed by the courts below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 105 F.3d 1400. The opinion of the district court granting summary judgment in favor of the United States (Pet. App. 11-30) is reported at 925 F. Supp. 731. An earlier opinion of the district court denying the United States' motion to dismiss (Pet. App. 27-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1997. A petition for rehearing was denied on May 28, 1997. Pet. App. 31-32. The petition for a writ of certiorari was filed on August 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Public Vessels Act (46 U.S.C. App. 781 *et seq.*) provides that a private plaintiff may bring a tort action for injury caused by a public vessel of the United States, including a Navy warship, if based on facts that would lead to liability of a private shipowner under similar circumstances. That Act incorporates by reference the consistent provisions of the Suits in Admiralty Act (46 U.S.C. App. 741 *et seq.*). See *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 170-171 (1976). Those statutes waive the sovereign immunity of the United States for actions covered by their terms. The Death on the High Seas Act (46 U.S.C. App. 761 *et seq.*) creates a maritime cause of action for fatal injuries caused by tortious acts on the high seas.

2. Beginning in September 1992, the navies of several North Atlantic Treaty Organization (NATO) countries, including Turkey and the United States, participated in an international, combined-forces naval exercise. The Commander in Chief of the Allied Forces Southern Europe—Admiral J.M. Boorda of the U.S. Navy—was the commander in charge of all forces participating in those exercises. Pet. App. 2.

The exercises simulated wartime encounters, with the participating units divided into two opposing forces, the Brown Forces and the Green Forces. Vice Admiral T. Joseph Lopez of the U.S. Navy commanded the Brown Forces; Admiral Kroon of the Netherlands commanded the Green Forces. The participating NATO countries' warships, including those from Turkey and the United States, were assigned to both the Brown Forces and the Green Forces. Pet. App. 2. The U.S. Navy aircraft carrier USS SARATOGA

(the SARATOGA) was assigned to the Brown Forces, and the Turkish destroyer TCG MUAVENET (the MUAVENET) was assigned to the Green Forces. *Ibid.*

The "enhanced tactical" or battle problem phase of the exercises required the Brown Forces to carry out an amphibious landing at Saros Bay, Turkey. The mission of the Green Forces was to stop and "destroy" the Brown Forces. Admiral Boorda ordered the Brown and Green Forces actively to seek and "destroy" each other. Pet. App. 2. Both task force commanders had full authority to engage the "enemy" when and where they judged appropriate, "using" all weapons to achieve victory. All attacks were to be simulated attacks. *Id.* at 2-3.

3. On October 2, 1992, the SARATOGA's Combat Direction Center Officer proposed a simulated missile firing drill using the SARATOGA's Sea Sparrow weapons system. That plan was approved by the Battle Group Commander and the Composite Warfare Commander for the Brown Forces. Pet. App. 3, 15.[1] For the drill, enlisted personnel on the Sea Sparrow team were awakened in the middle of the night; some members of the team were not aware that the exercise was a drill. The SARATOGA mistakenly fired two Sea Sparrow missiles at the MUAVENET, damaging the ship and resulting in the deaths of and injuries to Turkish crew members. *Ibid.*

Petitioners filed suit in district court, alleging negligence and seeking damages for injuries and wrongful deaths arising out of the missile firing. Pet.

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[1] Procedures aboard the SARATOGA, including those related to any simulated attacks, were the responsibility of the commanding officer. Pet. App. 3, 15.

App. 4, 17. The district court denied the government's motion to dismiss under the *Feres* doctrine (see *Feres* v. *United States*, 340 U.S. 135 (1950)), finding that the government had failed to establish all of the necessary elements for dismissal under that doctrine. Pet. App. 18, 27-30. After the parties entered into a stipulation of facts, the court granted the government's motion for summary judgment, *id.* at 11-26, holding that the complaint raises a non-justiciable political question, *id.* at 24-25.[2]

4. The court of appeals affirmed. Pet. App. 1-10. Applying the analysis provided by this Court in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), the court held that "[t]his suit exhibits most, if not all, of the indicia of political questions identified * * * in *Baker* v. *Carr*." Pet. App. 7. First, the court held that "[t]he underlying events involve two nations engaged in a NATO training exercise," which is "a matter of foreign policy." *Ibid.* Second, the court concluded that it lacked the competence to determine whether the Navy conducted the missile firing drill in a negligent manner. *Id.* at 8. Third, the court recognized that "resolving this case inevitably would require that courts make initial policy decisions of a kind appropriately reserved for military discretion, [i.e. whether] the Navy behaved negligently when it declined to advise each member of the Sea Sparrow missile team that the firing was a drill." *Id.* at 9. Fourth,

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[2] The district court held that it was "not qualified to make the determination of whether it was reasonable for the Navy to act in the manner in which it did, because the Court can not determine what level of information would be required to render the drill safe while at the same time retaining its usefulness as an accurate reflection of the Navy's preparedness for battle." Pet. App. 24-25.

the court opined that "adjudicating this case would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the judiciary's lack of expertise in these areas." *Ibid.* The court concluded by stressing that petitioners' complaint would "launch a * * * sweeping assault on the Navy's practices * * * [as] [t]he complaint alleges negligence relating to Navy communication, training, and drill procedures." *Id.* at 10.

ARGUMENT

The courts below properly held that petitioners may not recover damages from the United States under the Public Vessels Act for injuries they sustained during their participation in NATO military exercises on the high seas. Petitioners contend that this case does not implicate the political question doctrine. The court of appeals correctly rejected that argument in the unique circumstances of a multinational joint military training exercise. For many of the same reasons, petitioners' claims against the United States are in any event barred by the *Feres* doctrine, since those claims are based on alleged injuries incident to their service under U.S. command. Further review is not warranted because this suit was properly dismissed and because no other court has permitted a suit by foreign military personnel under the Public Vessels Act to proceed in such circumstances.

1. Petitioners contend (Pet. 4) that the decision of the court of appeals "conflicts * * * with the purposes of the political question doctrine." That argument is not supported by the decisions of this

Court. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court identified six independent circumstances that may indicate the presence of a non-justiciable political question (*id.* at 217):

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Contrary to petitioners' suggestion (Pet. 4, 11), the political question doctrine is not "new protection the Eleventh Circuit has devised." Rather, that doctrine is rooted in the constitutional principle of separation of powers and ensures that the judiciary assumes a properly limited role under our tri-partite system. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803); *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). As recognized by the court of appeals, that principle does not insulate "every case or controversy which touches foreign relations." Pet. App. 6 (quoting *Baker*, 369 U.S. at 211). Instead, a determination concerning the presence of a political question requires "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial

handling in light of its nature and posture in the specific case, and the possible consequences of judicial action." *Ibid.* (quoting *Baker*, 369 U.S. at 211-212). The court of appeals carefully analyzed petitioners' claims under the quoted standards and correctly concluded that they implicate those justiciability concerns. The Public Vessels Act did not open the U.S. courts to suits against the United States where those factors are present.

Executive Branch decisions concerning foreign relations and military operations are inherently political in nature: "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211 (footnote omitted). Petitioners nevertheless assert (Pet. 5-6) that this suit should be permitted to proceed because they seek only damages.[3] That contention is incorrect.

a. Petitioners maintain (Pet. 4-5) that the decision of the court of appeals conflicts with this Court's decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232

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[3] Petitioners' citation (Pet. 6) to a case involving a car accident between two off-duty service members does not support that proposition. In *Taber* v. *Maine*, 67 F.3d 1029, 1038-1050 (2d Cir. 1995), the court held that the *Feres* doctrine did not preclude a service member's action to recover damages resulting from a collision with a car driven by another service member, as both service members were on liberty, the accident occurred off-base, and the injury was not incident to their service and did not involve military discipline issues. See discussion at page 15, *infra*.

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(1974), and *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). In *Scheuer*, the district court dismissed on Eleventh Amendment grounds a suit for damages against the National Guard in Ohio for its activities relating to the Kent State University shootings. The court of appeals alternatively relied upon the doctrine of executive immunity for the defendant state officials. Those rulings, however, did not involve the political question doctrine. In allowing the suit to proceed, this Court noted that, in its earlier decision in *Gilligan*, it had not foreclosed all possibility of judicial review of National Guard activities. 416 U.S. at 248-249. But because the justiciability issue was not analyzed by this Court in *Scheuer* itself, that case scarcely can be thought to require the courts to hear petitioners' claims, especially since they arise out of the quite different circumstances of a joint military training exercise on the high seas.

The rationale used by the Court in *Gilligan* to find non-justiciable a suit seeking judicial supervision over the operation and training of the Ohio National Guard applies here as well. There, this Court stated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject

> *always* to civilian control of the Legislative and Executive Branches.

413 U.S. at 10. Although this Court in *Gilligan* did not foreclose the possibility that there may be accountability in a judicial forum for some official misconduct by military personnel, *id.* at 11-12, it noted that "no such questions are presented in this case," *id.* at 12. Petitioners thus can cite no decision of this Court for the view that a suit for damages must always be justiciable notwithstanding the political question doctrine.

b. Petitioners also contend (Pet. 4, 6-11) that the decision below conflicts with decisions of the Second, Ninth and Tenth Circuits, which they characterize as "exemplify[ing] the *Gilligan-Scheuer* principle that damages suits are normally not subject to the political question defense." Pet. 9. In none of the cases cited by petitioners, however, were military discipline or direct military or foreign policy determinations of the United States at issue.[4] See, *e.g.*, *Klinghoffer* v.

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[4] Petitioners' reliance (Pet. 8-9) on cases involving nuclear power plants is misplaced. Although the propriety of a decision to conduct nuclear-related activities may involve political questions, individual tort recoveries stemming from such activities in the domestic setting are not precluded under that doctrine. *McKay* v. *United States*, 703 F.2d 464, 470 (10th Cir. 1983) (neighboring landowners may seek recovery for injuries arising from federal government's operation of nuclear weapons manufacturing plant). Likewise in *Bennett* v. *Mallinckrodt, Inc.*, 698 S.W.2d 854 (Mo. Ct. App. 1985), cert. denied, 476 U.S. 1176 (1986), the Missouri Court of Appeals rejected a privately owned nuclear power plant's arguments that the Atomic Energy Act of 1954, which regulates nuclear power, triggered the political question doctrine, and held that nearby residents' claims for damages for injuries resulting

S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44 (2d Cir. 1991) (whether the Palestine Liberation Organization had breached its duty of due care and could be held liable for the murder of an American citizen during an attack on a ship); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (whether individual defendants who were alleged to have been responsible for torture, mass rape, and war crimes committed in Bosnia against civilian Bosnian women may be sued in federal district court under the Alien Tort Statute, 28 U.S.C. 1350), cert. denied, 116 S. Ct. 2524 (1996). Petitioners' reliance on cases allowing damages actions in cases brought by civilians are likewise inapposite. See, *e.g.*, *Koohi* v. *United States*, 976 F.2d 1328, 1331-1332 (9th Cir. 1992) (finding no political question in suit concerning destruction of a civilian Iranian passenger aircraft by a U.S. naval warship), cert. denied, 508 U.S. 960 (1993). Unlike the plaintiffs in *Koohi*, petitioners here were active-duty service members aboard a foreign warship participating in an international military exercise; they were members of an allied naval force; and they fell within a chain of command headed by a U.S. naval officer. Importantly, the injuries complained of arose solely as an incident of that service. As noted by the district court, petitioners' "attempt to classify themselves as civilians rather than as members of the armed services * * * [is] less than accurate." Pet. App. 22.[5]

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from plant activities were "a cost of doing business." *Id.* at 864.

[5] Contrary to petitioners' suggestion (Pet. 8), *Koohi* is readily distinguishable. First, the status of those injured—active military personnel here versus civilians in *Koohi*—implicates the political nature of the case in a far more

c. Nor did the cases cited by petitioners arise in the context of a multi-lateral treaty that contains its own dispute resolution mechanisms. The NATO member states have adopted a Status of Forces Agreement (SOFA), T.I.A.S. No. 2846, pursuant to which liabilities of the member states have been delineated. Article VIII(4), for example, provides that "[e]ach Contracting Party waives all its claims against any other Contracting Party for injury or death suffered by any member of its armed services while such member was engaged in the performance of his official duties." T.I.A.S. No. 2846, at 12. Whether in spite of that provision petitioners have a colorable claim under (or separate from) the SOFA would involve interpretation of that agreement.[6] The

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significant way. Furthermore, the incidental firing of missiles at the Iranian airplane does not involve the same policy considerations as are present in the joint military operations at issue here. Thus, the injuries sustained by petitioners give rise to important questions of military and foreign policy not implicated in *Koohi*.

[6] Petitioners contend that the SOFA does not apply to injuries occurring on the high seas. See Pet. 13 n.14. It is important to note, however, that the SOFA was adopted against the background of the Brussels Convention of 1926, pursuant to which states did not waive immunities "when the cause of action arises on Government and non-commercial service" with regard to "ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State." International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships, Brussels, Apr. 10, 1926, *reprinted in* 4 *International Maritime Law Conventions* 3096 (M. Singh ed. 1983). Although the United States was not a party to the Brussels Convention, virtually all of the NATO member states ratified that convention. Thus, the prevailing background principle at the time most of the NATO members ratified the

SOFA provides for a claims procedure (including arbitration) in certain circumstances (but denies it in others) when injury is suffered by third parties other than the Contracting Parties. Compare Art. VIII(8) at 16 with Art. VIII(5)(h) at 16. In any event, issues relating to the workings of NATO are subjects for consideration by the NATO Council, which consists of representatives of the member states, and for the respective dispute resolution mechanisms within NATO. See North Atlantic Treaty, Apr. 4, 1949, Art. 9, 63 Stat. 2244.

The decision by the court below to dismiss the lawsuit thus reflects a proper respect for the Exec-

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SOFA was that warships would not be liable for incidents like the one that occurred in this case.

The most that can be said in petitioners' favor about the SOFA itself is that it is ambiguous on this point. Article XX(1) of the SOFA provides that, "[s]ubject to the provisions of paragraphs 2 and 3 of this Article, the present Agreement shall apply only to the metropolitan territory of a Contracting Party." T.I.A.S. No. 2846, at 28. Paragraphs 2 and 3 of that article, however, make clear that that limitation is designed to exclude territories of a nation (such as Guam and the Northern Mariana Islands) as not being within the "metropolitan territory" of a Contracting Party. That limitation, in turn, is relevant only to those aspects of the SOFA that contain a limitation on territory, which Article VIII(4) does not. Cf. Art. VIII(5) at 14 (describing dispute resolution mechanism for claims arising out of "any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage *in the territory* of the receiving State to third parties, other than any of the Contracting Parties") (emphasis added). Because "[a] treaty is in the nature of a contract between nations," *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), its dispute resolution mechanisms should be given full effect before permitting resort to the municipal courts of one contracting party.

utive Branch's authority to conduct diplomatic and military relations with other nations. It also reflects a recognition that United States courts are not the appropriate forums for resolving liability issues in joint military training exercises involving allies of the United States pursuant to multi-lateral relationships that provide a basis for negotiated resolution of claims and disputes.

d. Finally, petitioners contend (Pet. 14) that this is a "simple and clear" case in which the government has provided a "virtual confession of negligence," and that it does not implicate any "judicial intrusion into military practices." That argument overlooks the analysis in which a court would have to engage to determine whether the actions could be deemed negligent under the standards of domestic tort law. Indeed, petitioners' argument is belied by the very nature and scope of the complaint.[7] Although the stipulation of facts entered into by the parties (see Pet. App. A39-A43) served in one sense to narrow the focus of disagreement, nothing in that stipulation purports

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[7] Petitioners allege the following negligent acts: (1) the "absence of adequate communication among personnel associated with the operation of the Sea Sparrow System"; (2) the "last-minute decision by SARATOGA Operational Watch Officers to conduct an ad hoc drill using the Sea Sparrow System to simulate attacks on nearby ships participating in the ongoing NATO exercise"; (3) the "decision to awaken the enlisted Sea Sparrow team to participate in the no-notice drill"; (4) the "failure to advise the oncoming missile system's operators that what was contemplated was a drill, a simulation, and not an actual event"; and (5) the "failure of the officers running the drill to understand the significance of terms and requests made by the missile fire control system operator which indicated that the missile crew was preparing for an actual missile launch." Pet. App. 17.

to foreclose any avenues of factual development that might be pursued in defense of the lawsuit, were it permitted to proceed. Based on the allegations contained in the complaint, the stipulated facts, and reasonable defenses to the complaint, the district court would have to delve into the details of training and communications aboard an aircraft carrier during a joint military training exercise. That "problematic" inquiry would "call into question military discipline and decisionmaking [and] would itself require judicial inquiry into, and hence, intrusion upon, military matters." *United States* v. *Stanley*, 483 U.S. 669, 682 (1987). Petitioners' suggestion (Pet. 14) that this inquiry would be unnecessary because the court could simply predicate liability on the doctrine of *res ipsa loquitur* fails to acknowledge that even that doctrine permits a defendant to rebut an inference of negligence. See, *e.g.*, *United States* v. *Baycon Indus., Inc.*, 804 F.2d 630, 634 (11th Cir. 1986).

2. The judgment of the court of appeals is in any event correct because petitioners' suit is barred by the *Feres* doctrine. See *Feres* v. *United States*, 340 U.S. 135 (1950). The court of appeals declined to reach the *Feres* issue. Pet. App. 4 n.1. In its initial consideration of the *Feres* defense, the district court had denied the government's motion to dismiss under *Feres* because, "at that time," the government had "failed to show that [petitioners] were under the supervision of an American superior * * * and it failed to show that there was an alternative source of compensation available to [petitioners]." *Id.* at 18 & n.1. Upon reconsideration, however, the court acknowledged that the United States had since furnished additional information and that "it is likely that this case would be dismissed on that basis [the

Feres doctrine] in light of the additional information which has been provided." *Ibid.*

As recognized by this Court, *Feres* and its progeny prohibit suits brought by U.S. military personnel against the United States for injuries sustained incident to their service, because such actions would "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States* v. *Johnson*, 481 U.S. 681, 690 (1987).[8] Under similar circumstances involving non-American service members working under American commanders, *Feres* has been found applicable. See *Daberkow* v. *United States*, 581 F.2d 785, 788 (9th Cir. 1978) ("The relationship between a foreign soldier engaged in joint military activities and his American superiors is similar to the relationship of an American soldier to an American superior; military discipline could be disrupted just as much by a foreign serviceman's lawsuit as by an American's."); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 779-780 (1980) (holding that *Feres* doctrine barred suits by Australian service members who claimed injury from expense to the herbicidal Agent Orange in Vietnam War), on reconsideration, 580 F. Supp. 1242 (E.D.N.Y. 1984), appeal dismissed, 745 F.2d 161 (2d Cir. 1984). Indeed, the district court in this case stated that, although petitioners "were actually part of another country's armed forces, they should be treated as though they were serving within the Executive Branch for the purpose of determining

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[8] Suits arising in circumstances covered by *Feres* have been held to be barred under the Public Vessels Act as well. See, *e.g.*, *Cole* v. *United States*, 755 F.2d 873, 876 n.7 (11th Cir. 1985).

whether the Court should refrain from deciding this case." Pet. App. 23.

Because of the joint nature of the NATO military exercises, in which all forces were under the command of a U.S. Navy admiral, the Turkish sailors should not be afforded a cause of action in United States courts that is unavailable to United States service members involved in the same exercise.[9] Such preferential treatment for foreign service members would undermine the morale of the forces and subject the U.S. command to the sort of intrusive inquiry by civilian courts into internal military affairs that *Feres* held to exceed the scope of the United States' waiver of sovereign immunity to ordinary tort suits. See *Johansen* v. *United States*, 343 U.S. 427, 432 (1952) ("[I]t is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.'") (quoting *Feres*, 340 U.S. at 139); *Blakey* v. *U.S.S. Iowa*, 991 F.2d 148, 151

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[9] This action also may well be barred as arising out of discretionary functions regarding the manner in which a naval training exercise will be conducted, including the nature of the instructions provided. The Public Vessels Act has been construed not to allow recovery in circumstances analogous to those in which a suit would be barred under the discretionary function exception to the Federal Tort Claims Act. See *United States Fire Ins. Co.* v. *United States*, 806 F.2d 1529 (11th Cir. 1986). Although the discretionary function bar was not raised in the district court, it is jurisdictional, and thus could be raised in the course of any further proceedings in the district court. Immunity based on discretionary functions further underscores the soundness of the lower courts' dismissal of this case and further attenuates any possibility that petitioners could ultimately recover.

(4th Cir. 1993). Thus, just as the *Feres* doctrine contemplates that U.S. military personnel must look to the special medical and other benefits Congress has made available to them, *Johansen*, 343 U.S. at 440; *Feres*, 340 U.S. at 144, that doctrine contemplates that foreign military personnel seeking recovery in circumstances such as these must look to whatever benefits their own government has made available to its military personnel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1997

REPLY

BRIEF

(3)

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PETITIONERS' REPLY BRIEF

The Government's Brief in Opposition subtly distorts the facts and procedural posture of the present case. It also misinterprets the Public Vessels Act, the NATO Status of Forces Agreement, and this Court's decision in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Moreover, it claims undue breadth for the political question, *Feres*, and discretionary function doctrines.

I. In the Trial Court, the Government Effectively Conceded Liability on the Merits.

The Brief in Opposition (Opp. 13-14) errs in asserting that "avenues of factual development" beyond the confines of the Stipulation of Fact (Pet.App. 39-43) have not been foreclosed. On the contrary, they have been *expressly* foreclosed. In the United States District Court for the Middle District of Florida, the Government and the plaintiffs entered into a binding pretrial order[1] that confined the trial of the liability issue to the Stipulation of Fact (Pet.App. 39-43). The only liability issues that could arise at trial of the merits of this case would necessarily be confined to exploring the meaning of the Stipulation of Fact.[2] At the Pretrial Conference that occurred on

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[1] It is familiar law that a "pre-trial order is treated as superseding the pleadings and establishes the issues to be considered at trial." *Erff v. MarkHon Industries, Inc.*, 781 F.2d 613, 617 (CA7 1986); see Fed. R. Civ. P. 16(e). Local Rule 3.06(e) of the Middle District of Florida explicitly states that "[a]ll pleadings . . . shall be deemed to be merged [in the] pretrial order [which] will control the course of the trial and may not be amended except by order of the Court in the furtherance of justice."

[2] The Pretrial Order, Nov. 3, 1995, states at p. 3 that "this action shall proceed to trial pursuant to the pretrial stipulation

November 3, 1995, Judge Schlesinger asked both counsel whether they proposed to offer any additional liability evidence or raise any additional liability issues beyond the confines of the Stipulation of Fact. At pp. 34-35 of the Transcript of Pretrial Proceedings, each said no. For the plaintiffs, Mr. Duẽ responded as follows:

> *THE COURT: Is there any additional evidence that you want to present other than what's in your motions on the liability question?*
>
> *MR. DUẼ: No, Your Honor.*

For the Government, David V. Hutchinson, Esq., the Government's trial counsel, responded as follows:

> *THE COURT: What do you think on time, on the liability issue only [as opposed to individual damages issues]?*
>
> *MR. HUTCHINSON: The liability issue, I don't think at this point either side intends to call anybody. We're pretty much on the legal issues. That's pretty much where it is.*

The Stipulation of Fact comes about as close to conceding negligence liability as one could do, short of using

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and this Order and no amendments shall be made to the stipulation or this Order except upon written motion and good cause shown." The Pretrial Stipulation states (at p. 2, under the heading "Contentions of the Parties") that both parties rest on the Stipulation of Fact and that neither contemplates the introduction of evidence on the issue of liability. Again at p. 3, under the heading "Plaintiffs' Contentions," it states that "the Court need take no testimony on the liability issue." On the same page, the section captioned "Contentions of the United States of America" concedes that "two Sea Sparrow missiles were mistakenly fired from the USS SARATOGA and struck the TCG MUAVENET and that some of the Plaintiffs suffered personal injuries as a result of that incident" and mentions only a single liability issue: "[I]t is contended the purely emotional distress Plaintiffs have no cause of action in admiralty."

the word "negligence." See ¶¶13-17, Pet.App. 41-42. Even aside from the Government's representation that it would not go beyond the Stipulation of Fact in trying this case on the merits, it is very difficult to imagine the factual defense that could be offered. Please note that the Brief in Opposition is exceedingly vague about the "avenues of factual development that might be pursued in defense of the lawsuit" (Opp. 14). Petitioners have repeatedly asked Government counsel for clarification of this claim, to no avail.

II. The Government Errs in Suggesting that the Missile Drill Had High-Level Oversight.

A key portion of the Stipulation of Fact establishes that "the missile firing was internal to Saratoga" (¶11, Pet.App. 41). When the Brief in Opposition asserts that the drill was "approved by the Battle Group Commander and the Composite Warfare Commander" (Opp. 3), it omits to mention that these two titles belonged to the same man, Admiral Dur, who happened to be aboard the Saratoga when the plan was hatched (¶11, Pet.App. 41).

III. The Turkish Sailors Were Not Under U.S. Navy Command.

The assertion in the Brief in Opposition that the wounded Turkish sailors "fell within a chain of command headed by a U.S. naval officer" (Opp. 10) is mistaken. No one was aboard the Muavenet except Turks. The plaintiffs answered to their Turkish superiors, who in turn answered ultimately to the Dutch admiral (Admiral Kroon) at the head of the Green Forces, who in turn answered to Admiral Boorda. In heading the Green Forces Admiral Kroon was asserting authority derived from NATO, not his native country. Similarly, Admiral Boorda, in overall command of the operation, derived his

authority from NATO. It is not reasonable to suppose that Turkey would place its Navy under the command of an American. Petitioners believe that a classified NATO document identified as AF SOUTH Military Committee Memorandum 324 – first issued in 1978 and revised in 1988 and 1994 – was the source of Admiral Boorda's command. His authority over the Turkish ship derived from NATO, not the United States.

On the world stage, the United States is currently asserting that the presence of United States nationals among the UN weapons inspectors in Iraq does not detract from the UN nature of the inspection operation. Identical reasoning should obtain here.

IV. By Its Clear Terms, the Public Vessels Act Authorizes the Present Action.

The Brief in Opposition errs in indicating that the Public Vessels Act, 46 U.S.C. app. 781 et seq., is limited to "private plaintiff[s]" (Opp. 2). The statute contains no language to that effect,[3] and it has repeatedly and routinely been construed to permit actions against the United States by States and by foreign governmental entities. See *Kunglig Jarnvagsstyrelsen v. United States,* 19 F.2d 761 (CA2 1927) (Suits in Admiralty Act action by Swedish governmental entity); *Ozanic v. United States,* 188 F.2d 228, 231 (CA2 1951) (dictum that "the Yugoslav Government [could have] sued in the district court under the Public Vessels Act"); *State of Maine v. United States,* 45 F.Supp. 35 (D.Me. 1942), *aff'd,* 134 F.2d 574 (CA1), *cert. denied,* 319 U.S. 772 (1943) (entertaining a libel by the

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[3] 46 U.S.C. app. 783 regulates cross-libels, set-offs, and counterclaims in situations in which the United States has sued "a privately owned vessel" and expresses no limit on who can initiate an action against the United States.

State of Maine under the Public Vessels Act for damage to a bridge).[4]

If a foreign or state governmental entity can sue under the Public Vessels Act, *a fortiori* there is no obstacle presented by the fact that the victims of the Saratoga's negligence were members of the Turkish navy. And note that the Public Vessels Act explicitly contemplates suits by foreign nationals, setting a reciprocity condition in 46 U.S.C. app. 785[5] that the Government concedes has been satisfied here (see Pet.App. 44).

V. The NATO Status of Forces Agreement Has No Bearing on the Present Matter.

The Government's contention that further proceedings in this case "would involve interpretation" of NATO-SOFA (Opp. 11) overlooks the language of that treaty's Preamble (emphasis added):

> The Parties to the North Atlantic Treaty signed in Washington on 4 April, 1949,
>
> Considering that the forces of one Party may be sent, by arrangement, to serve *in the territory of another party;*
>
> Bearing in mind that the decision to send them and the conditions under which they will be sent, in so far as such conditions are not laid

---

[4] The *State of Maine* court dismissed the case for lack of admiralty jurisdiction because the damage caused by the U.S. public vessel (to a bridge) was deemed to have occurred on land. The Admiralty Extension Act, 46 U.S.C. app. 740, now provides for admiralty jurisdiction in such situations.

[5] "No suit may be brought under this chapter by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts."

> down in the present Agreement, will continue to be the subject of separate arrangements between the Parties concerned;
>
> Desiring, however, to define the status of such forces *while in the territory of another Party;*
>
> Have agreed as follows. . . .

Immediately following the Preamble, Article I repeats the limitation to the *territory* of the contracting parties, defining the pervasive term "force" as "the personnel belonging to the land, sea or armed air services of one Contracting Party *when in the territory of another Contracting Party. . . .* " Article XX(1) again repeats the idea, stating that "[s]ubject to the provisions of paragraphs 2 and 3 of this Article, *the present Agreement shall apply only to the metropolitan territory of a Contracting Party.*"

The Government is wrong to suggest (Opp. 12 n.6) that paragraphs 2 and 3 of Article XX somehow produce an ambiguity as to the meaning of "territory." Those two paragraphs deal with "territories for whose international relations [a NATO partner] is responsible" and thus color the term "metropolitan" rather than the term "territory." The Preamble, Article I, and Article XX(1) thus all say the same thing: NATO-SOFA of its own force does not touch events on the high seas.[6]

As noted above, the Preamble contemplates "separate arrangements" between NATO parties to individual operations. The United States and Turkey did enter into a "Memorandum of Understanding Between the Turkish General Staff (TGS) And the United States European Command (USEUCOM) Concerning the Provision of Host

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[6] Nor does the alleged "background of the Brussels Convention of 1926" (Opp. 11 n. 6) import any ambiguity. SOFA was adopted in 1951, and it is quite unlikely that the parties to it were even remotely thinking about an obscure 1926 convention that the United States never ratified or acceded to.

Nation Support to U.S. Forces During Display Determination 92 (DD-92)." Nothing in this Memorandum of Understanding purported to treat events occurring on the high seas.

The Brief in Opposition is the first time the Government has even hinted that NATO-SOFA has any potential applicability here. Plainly it does not. Moreover, the Government has waived any argument to the contrary. The Navy sent a letter – captioned "General Claims Guidance for Claimants" – to each of the plaintiffs, outlining Navy JAG's settlement authority and informing each potential plaintiff that, settlement failing, suit would need to be filed in a United States District Court within two years "under either the Suits in Admiralty Act . . . or the Public Vessels Act." This letter is set forth *infra* as Appendix A; it shows that the Brief in Opposition is mistaken in attempting to bring SOFA into play at this late date.

VI. The Brief in Opposition Takes Liberties with Key "Political Question" Jurisprudence.

The Government correctly notes (Opp. 6-7) that *Baker v. Carr*, 369 U.S. 186, 211 (1962) – which held that the composition of the Tennessee legislature *was* justiciable – insists that the political question doctrine requires "discriminating analysis of the particular question posed," but otherwise eschews any attention to the *particular* liability question posed by the present case. Instead, it offers a gross generalization: "Executive Branch decisions concerning foreign relations and military operations are inherently political in nature" (Opp. 7). The generalization is inapposite: This lawsuit does not challenge any "Executive Branch decisions" but only the inadvertent lapses of a handful of enlisted men and junior officers aboard the Saratoga.

Moreover, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), shows that the generalization is not only inapposite but wrong; ordinarily it does not apply to damages suits. In holding that the Kent State shootings were justiciable, the *Scheuer* Court referred repeatedly (see *id.* at 234, 249) to *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which the Court had indicated (at 11-12) that while injunctive relief to reform the Ohio National Guard was not justiciable, a damages suit would probably lie. The Government's assertion that "the justiciability issue was not analyzed by this Court in *Scheuer* itself" (Opp. 8) is a meaningless technicality. There is no doubt that *Gilligan* and *Scheuer* placed this Court squarely behind the proposition that damages suits are presumptively justiciable.[7]

The Brief in Opposition resorts to verbal sleight-of-hand in its efforts to distinguish *Koohi v. United States*, 976 F.2d 1328 (CA9 1992), *cert. denied*, 508 U.S. 960 (1993). Not content with the erroneous claim that the Turkish sailors were under U.S. Navy command, the Opposition contrasts "the incidental firing of missiles at the Iranian airplane" with the "policy considerations . . . present in the joint military operations at issue here" (Opp. 11 n.5). Obviously this is an "apples and oranges" feint. The correct comparison is between the incidental firing of the *Koohi* missiles and the accidental and wholly inadvertent firing of the Saratoga missiles. It is hard to see the difference.

VII. Neither *Feres* Nor "Discretionary Function" Affords a Legitimate Basis for Dismissing this Suit.

United States v. Johnson, 481 U.S. 681, 688-91 (1987), holds that *Feres* bars adjudication in cases in which "three

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[7] That same proposition was *spelled out* by the courts in *Klinghoffer v. Palestine Liberation Organization*, 937 F.2d 44, 49 (CA2 1991) and *Kadic v. Karadzic*, 70 F.3d 232, 249 (CA2 1995), *cert. denied*, 116 S.Ct. 2524 (1996).

broad rationales" are implicated. None of the three is implicated here. (1) There is no "distinctively federal" relationship between the Turkish sailors and the United States Government, and these claims are governable by the general maritime law, not potentially disparate state law. (2) The Turkish sailors are not entitled to the "comprehensive system of benefits" available to U.S. servicemen under the Veterans Benefits Act, nor indeed to any compensation from any other source than their potential tort claims.[8] (3) No inquiry into "sensitive military affairs" is involved in the instant action, which asserts only that it is tortious to mistakenly destroy a friendly ship.[9]

Johnson is further noteworthy because four members of the Court, led by Justice Scalia, asserted that "*Feres* was wrongly decided and heartily deserves 'the widespread, almost universal criticism' it has received." 481 U.S. at 700.

The discretionary function doctrine did not bar litigation against the Government in *Peterson v. United States*, 673 F.2d 237 (CA8 1982) (low flight, sonic boom), *Ward v. United States*, 471 F.2d 667 (CA3 1973) (same), or *Goodwin*

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[8] The Turkish Government furnished in-kind medical care on a short term basis to some of the plaintiffs.

[9] Neither *Daberkow v. United States*, 581 F.2d 785 (CA9 1978), nor *In re Agent Orange*, 506 F.Supp. 762 (E.D.N.Y. 1984), is on point. In *Daberkow* a West German airman was killed while being trained at an Air Force base in this country, and his widow's lawsuit directly challenged the orders her husband had received from his American superior. The Australian victims in *Agent Orange* conceded "the existence of a compensation scheme for Australian veterans similar to that provided by the United States government." 506 F.Supp. at 780. Moreover, the reasoning of *Agent Orange* has been subjected to serious criticism. See, e.g., *Del Rio v. United States*, 833 F.2d 282, 287 n. 8 (CA11 1987).

v. United States, 141 F.Supp. 445 (E.D.N.C. 1956) (Marine Corps inadvertently dropped a bomb on a fishing vessel). It would not apply in the present case either. That is presumably why the Government has not (aside from Opp. 16 n.9) urged it.

VIII. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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GENERAL CLAIMS GUIDANCE FOR CLAIMANTS

The following is a brief explanation of the applicable laws regarding death, personal injury and property damage claims filed against the U.S. Navy.

Acting on behalf of the U.S. Secretary of the Navy, the Admiralty Division of the Office of the Judge Advocate General of the U.S. Navy is responsible for the adjudication of all tort claims arising on the high seas and stemming from the operation of U.S. Navy vessels or otherwise involving naval personnel or property. The Admiralty Division can be contacted by mail at the following address:

> Department of the Navy
> Office of the Judge Advocate General
> Admiralty Division – Code 31
> 200 Stovall Street
> Alexandria, VA (USA) 22332-2400.

The U.S. Secretary of the Navy has authority, pursuant to Title 10 of the United States Code, section 7622 (1988), to settle claims arising on the high seas for damage caused by a U.S. Navy vessel or other property of the Navy, or by a tort committed by an agent or employee of the Navy, where legal liability exists and the matter is not in litigation. The Secretary's authority is subject to a two-year limitation period, which is not extended by the filing of a claim or by any correspondence or negotiations related to a claim. In other words, a claim must be approved for payment within two years of the date on which it arose. Notice of this two-year limitation period is provided to

the public at Title 32 of the Code of Federal Regulations, section 752.3(d) (1990).

Further, suits against the United States based upon torts committed by agents or employees of the Navy, or for damages caused by a Navy vessel, where the incident giving rise to the suit occurred on the high seas must be brought under either the Suits in Admiralty Act, Title 46 of the United States Code, Appendix sections 741-752 (1988), or the Public Vessels Act, Title 46 of the United States Code, Appendix sections 781-790 (1988). Both of these statutes contain two-year limitation periods running from the date of the event upon which a suit is based. You are also advised that the only proper forum for such litigation is a United States District Court.

There is no particular form for asserting an admiralty claim against the United States, but satisfactory proof of liability and damages must be presented. The claimant must provide adequate documentation of the amount of damages.

Acknowledgment of receipt:

_____ _____

(claimant's signature) (date)